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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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11 DeWAYNE G. THOMAS,

No. CIV S-04-0695-LKK-CMK-P

12 Plaintiff,

13 vs.

FINDINGS AND RECOMMENDATIONS

14 JOSEPH A. BICK,

15 Defendant.
16 _____/

17 Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant
18 to 42 U.S.C. § 1983. Pending before the court is defendant's motion for summary judgment
19 (Docs. 25 and 30). Plaintiff has not filed a response.
20

21 **I. BACKGROUND**

22 Plaintiff alleges that defendant, as the Chief Medical Officer, was deliberately
23 indifferent to his serious medical needs by refusing to approve his use of an electric air filter
24 device in his cell. Plaintiff states that he is asthmatic and that another prison doctor had
25 recommended the air filter.

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II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when it is demonstrated that there exists “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). Under summary judgment practice, the moving party

... always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). “[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the ‘pleadings, depositions, answers to interrogatories, and admissions on file.’” Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. Id. at 322. “[A] complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” Id. In such a circumstance, summary judgment should be granted, “so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied.” Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome

1 of the suit under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986);
2 T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987), and
3 that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict
4 for the nonmoving party, Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

5 In the endeavor to establish the existence of a factual dispute, the opposing party
6 need not establish a material issue of fact conclusively in its favor. It is sufficient that “the
7 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
8 versions of the truth at trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary
9 judgment is to ‘pierce the pleadings and to assess the proof in order to see whether there is a
10 genuine need for trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory
11 committee’s note on 1963 amendments).

12 In resolving the summary judgment motion, the court examines the pleadings,
13 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
14 any. See Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See
15 Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed
16 before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587.
17 Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s obligation to
18 produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen
19 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff’d, 810 F.2d 898, 902 (9th Cir.
20 1987). Finally, to demonstrate a genuine issue, the opposing party “must do more than simply
21 show that there is some metaphysical doubt as to the material facts Where the record taken
22 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no
23 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted).

24 On July 14, 2004, the court advised plaintiff of the requirements for opposing a
25 motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154
26 F.3d 952 (9th Cir. 1998) (en banc); Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

III. DISCUSSION

In his motion for summary judgment, defendant argues that a disagreement in medical opinion, whether between the plaintiff and doctor, or among doctors, does not rise to an Eighth Amendment violation as a matter of law. Defendant also argues that there is no evidence that he was deliberately indifferent with respect to his decision to deny plaintiff the air filter device.

The treatment a prisoner receives in prison and the conditions under which the prisoner is confined are subject to scrutiny under the Eighth Amendment, which prohibits cruel and unusual punishment. See Farmer v. Brennan, 511 U.S. 825, 832 (1994). The Eighth Amendment “. . . embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency.” Estelle v. Gamble, 429 U.S. 97, 102 (1976). A prison official violates the Eighth Amendment only when two requirements are met: (1) objectively, the official’s act or omission must be so serious such that it results in the denial of the minimal civilized measure of life’s necessities; and (2) subjectively, the prison official must have acted unnecessarily and wantonly for the purpose of inflicting harm. See Farmer, 511 U.S. at 834. Thus, to violate the Eighth Amendment, a prison official must have a “sufficiently culpable mind.” See id.

Deliberate indifference to a prisoner’s serious illness or injury, or risks of serious injury or illness, gives rise to under the Eighth Amendment. See Estelle, 429 U.S. at 105; see also Farmer, 511 U.S. at 837. This applies to physical as well as dental and mental health needs. See Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982). An injury or illness is sufficiently serious if the failure to treat a prisoner’s condition could result in further significant injury or the “. . . unnecessary and wanton infliction of pain.” McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992); see also Doty v. County of Lassen, 37 F.3d 540, 546 (9th Cir. 1994). Factors indicating seriousness are: (1) whether a reasonable doctor would think that the condition is worthy of comment; (2) whether the condition significantly impacts the prisoner’s daily activities; and (3) whether the condition is chronic and accompanied by substantial pain. See

1 Lopez v. Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000) (en banc).

2 The requirement of deliberate indifference is less stringent in medical needs cases
3 than in other Eighth Amendment contexts because the responsibility to provide inmates with
4 medical care does not generally conflict with competing penological concerns. See McGuckin,
5 974 F.2d at 1060. Thus, deference need not be given to the judgment of prison officials as to
6 decisions concerning medical needs. See Hunt v. Dental Dep't, 865 F.2d 198, 200 (9th Cir.
7 1989). The complete denial of medical attention may constitute deliberate indifference. See
8 Toussaint v. McCarthy, 801 F.2d 1080, 1111 (9th Cir. 1986). Delay in providing medical
9 treatment, or interference with medical treatment, may also constitute deliberate indifference.
10 See Lopez, 203 F.3d at 1131. Where delay is alleged, however, the prisoner must also
11 demonstrate that the delay led to further injury. See McGuckin, 974 F.2d at 1060.

12 Negligence in diagnosing or treating a medical condition does not, however, give
13 rise to a claim under the Eighth Amendment. See Estelle, 429 U.S. at 106. Moreover, a
14 difference of opinion concerning the appropriate course of treatment does not give rise to an
15 Eighth Amendment claim. See Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

16 As to defendant's first argument that a claim based on a difference of opinion
17 cannot give rise to an Eighth Amendment claim, the court must agree. See id. Therefore, to the
18 extent plaintiff's claim is based on the difference of opinion between the doctor that initially
19 recommended the air filter and defendant's decision to the contrary, defendant is entitled to
20 judgment as a matter of law.

21 As to defendant's second argument that there is no evidence to establish
22 deliberate indifference, the court finds that defendant has met his burden under the summary
23 judgment standards of informing the court of his position and demonstrating the absence of a
24 genuine issue of material fact. In particular, defendant provides his declaration in which he
25 states, among other things, that:

26 1. He had occasion to treat plaintiff;

2. He conducted a supervisory review of a subordinate doctor's recommendation that plaintiff be provided with an air filter device;
3. Plaintiff's asthma, while chronic, responds well to treatment;
4. He was aware that asthma can be exacerbated by exposure to second-hand tobacco smoke;
5. At all relevant times, the prison had a smoke-free policy;
6. In his medical opinion, the air filtration device would be of only speculative benefit to plaintiff;
7. Providing the device could compromise institutional security;
8. He never had any ill-will towards plaintiff or allowed his opinion to be based on anything other than his experience, training, and medical observations; and
9. He was at all times motivated by the good faith desire to provide plaintiff with competent and compassionate medical care.

Plaintiff does not dispute these assertions by way of a response to defendant's motion.

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IV. CONCLUSION

Based on the foregoing, the undersigned recommends that:

1. Defendant's motion for summary judgment be granted; and
2. The Clerk of the Court be directed to enter judgment and close this file.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days after being served with these findings and recommendations, any party may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: April 6, 2006.


CRAIG M. KELLISON
UNITED STATES MAGISTRATE JUDGE